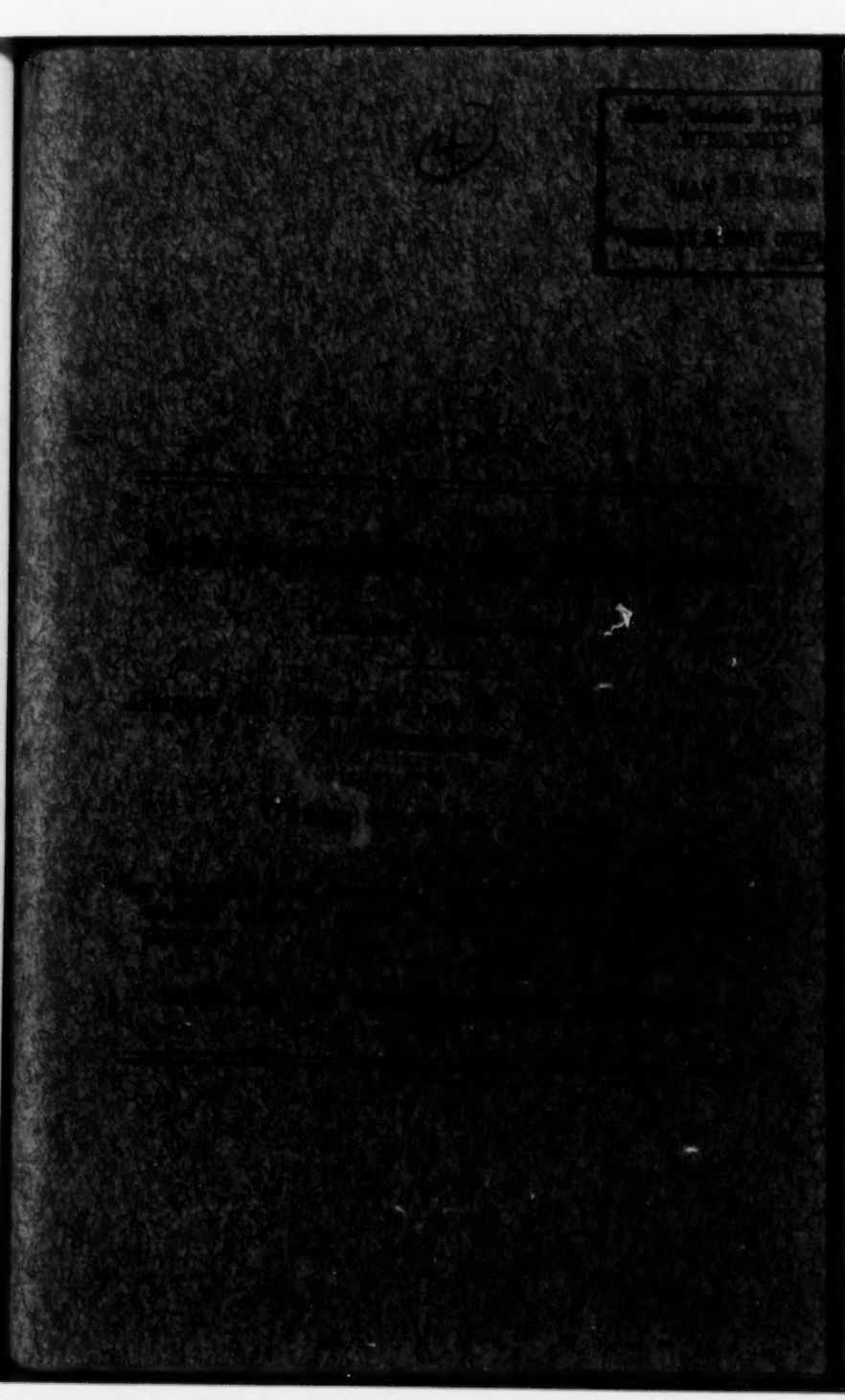

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1203

GEORGE E. DILLMAN AND W. R. HESS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 2147–2232) has not been reported. The opinion of the circuit court of appeals (R. 2340–2346) is reported in 146 F. 2d 572. The order denying application to recall the mandate and amending one sentence of the opinion (R. 2366–2367) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 28, 1944 (R. 2347). A

petition for rehearing was denied on January 26, 1945 (R. 2356), and the petition for a writ of certiorari was filed on April 25, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in condemnation proceedings it was not reversible error for the trial court (a) to admit in evidence and consider offers to buy and sell the condemned and other property; (b) after the trial and without affording the Government opportunity to cross-examine or offer rebuttal testimony, to obtain information from a police officer while viewing the premises; and (c) after the trial and without affording the government opportunity to cross-examine or present rebuttal testimony, to interview condemnation commissioners from whose awards the parties had appealed for a trial *de novo*.

2. Whether the court below could deny application, made after reversal, to recall its mandate and to take other steps to permit the trial judge to amend his opinion, which constituted his findings of fact and conclusions of law.

STATEMENT

This is a condemnation proceeding brought by the United States on March 21, 1942, to acquire 15,000 acres of farm land (together with improve-

ments and growing crops) in Carson County, Texas, for the establishment of the Pantex Ordnance Plant (R. 2–8). Possession of these properties was delivered to the United States on or about April 20, 1942 (R. 9–11, 2246). Under a declaration of taking the Government deposited in court $429,263 as estimated just compensation for the 31 tracts involved here (R. 11–28, 2341). Pursuant to a Texas statute,[1] three commissioners were appointed to hold hearings and value the properties (R. 42), and on March 1, 1943, they returned awards of just compensation for all the land taken (R. 119–143). Objections to the awards, totaling $665,556.49 for the 31 tracts, were filed by the United States and several of the landowners (R. 144–176). As a result, a trial *de novo*[2] as to those tracts was had in July and August 1943, at which the right to a jury trial was waived by the parties (R. 231, 2147, 2247).

At the trial the court permitted the landowners to introduce a large volume of evidence relating to and based upon the prices named in alleged offers to buy and offers to sell the properties in question and neighboring lands (R. 312, 313, 375–376, 396, 662, 688–689, 709, 711–715, 798, 801–802, 805, 1057, 1098, 1250–1251, 1389, 1398–1399, 1497–1498, 1574, 1579, 2065–2066). The

[1] Texas Anno. Rev. Civ. Stat. (Vernon), Article 3264.
[2] Texas Anno. Rev. Civ. Stat. (Vernon), Article 3266.

Government's objections to this type of proof were overruled (R. 376, 709, 1098, 2066), and the court placed the burden upon the Government to show, if it were able, the facts and circumstances surrounding each offer which would affect its weight (R. 376–377). After all this evidence as to offers and opinions based upon offers had been received, counsel for some of the landowners moved the court to withdraw the evidence as to listings and "offers to purchase comparable property outside of the area" taken (R 2110). However, the withdrawal was not made on behalf of all the condemnees, and it did not include the alleged offers for the properties condemned or the opinion testimony based entirely or largely upon offers (R. 2110).

After the taking of evidence was concluded, the trial judge, at the request of government counsel and counsel for some of the landowners, viewed the properties condemned (R. 2195). He was accompanied by a government attorney and a police sergeant on this inspection trip (R. 2221). In the company of a government attorney, he also interviewed the commissioners who had made the original awards (R. 2227). On October 11, 1943, the trial judge rendered an oral opinion which he later adopted as his findings of facts and conclusions of law (R. 2147–2232, 2247). In the opinion it was clearly indicated that he had considered offers as a basis for arriving at his awards of just compensation (R. 2193, 2195) and that

witnesses, who had based their opinions largely, if not completely, upon offers (Meaker, R. 396; Mahler, R. 708–716; Wink, R. 1097–1098; Klinke, R. 1250–1251, 1497; Gau, R. 1398–1399) were accepted as "outstanding" witnesses on value (R. 2193–2195). The opinion also revealed that on his inspection tour the trial judge had obtained information from the police officer as to the original contours of the properties, which had undergone considerable change since the Government went into possession, and used the information thus obtained to discredit a government witness (R. 2188, 2195–2196, 2221–2222). The opinion disclosed too that, rather than arriving at independent awards of just compensation for each tract, the court merely determined from his interview with the commissioners that they had been too low by a certain percentage in their valuations and that the awards should be adjusted accordingly (R. 2227–2231). An accountant was appointed to represent the court in computing the awards in accordance with the findings (R. 2231). A judgment in the total sum of $783,907.73 for the 31 tracts was entered, the court finding an overall value for each tract and ordering distribution of a part of the award to a tenant for crops wherever necessary (R. 2234–2291).

The Government appealed (R. 2291–2301), and on December 28, 1944, the circuit court of appeals, with Judge Sibley dissenting, reversed the judg-

ment of the district court, holding that it was prejudicial error for the court to have taken the police officer on the inspection trip and to have obtained information from him as to the lands; that the trial court erred in going to interview the commissioners about their report; and that the consideration of evidence touching offers to buy and offers to sell was clearly erroneous (R. 2340–2346). A petition for rehearing was denied on January 26, 1945 (R. 2356), and petitioners then filed an application to recall the mandate, permit the trial judge to amend his opinion, and to file a second petition for rehearing (R. 2357–2365). This application was denied on April 10, 1945, the court amending one sentence of its opinion (R. 2367). The petition for a writ of certiorari was filed on April 25, 1945.

ARGUMENT

Petitioners' complaint of the decision below is largely based on assertions that the Government did not object to or acquiesced in the various erroneous rulings and actions by the trial court (see, *e. g.*, Pet. 4, 8, 9, 20, 24, 26). It is clear that the Government properly preserved objections to various erroneous rulings of the trial court. Even if the petitioners' assertions were well founded, the argument lacks merit. An appellate court always has power, absent an objection, to notice errors apparent in the record in order to prevent a manifest miscarriage of justice. *Hormel* v. *Helvering,*

312 U. S. 552, 556–559; *United States* v. *Harrell*, 133 F. 2d 504, 507 (C. C. A. 8) and cases there cited.

1. Offers to purchase or to sell property are not competent evidence of market value. *Sharp* v. *United States*, 191 U. S. 341, 348–350. Opinions of value largely or completely based upon such offers are likewise incompetent. *Atlantic Coast Line R. Co.* v. *United States*, 132 F. 2d 959, 963 (C. C. A. 5); cf. *McCandless* v. *United States*, 74 F. 2d 596, 602–603 (C. C. A. 9), reversed on other grounds, 298 U. S. 342. In this case, a great abundance of such testimony was introduced over objection by government counsel (R. 312, 313, 375–376, 396, 662, 688–689, 709, 711–715, 798, 801–802, 805, 1057, 1098, 1250–1251, 1389, 1398–1399, 1497–1498, 1574, 1579, 2065–2066). Two of the offers admitted in evidence in these 1942 condemnation proceedings were as remote as 1928 and 1929 (R. 1098, 1574). One witness, referred to by the trial court as an "outstanding" witness on values (R. 2195), conceded that he had based his opinions upon offers made in 1919 and 1929 (R. 1250–1251, 1497). The only valuation testimony by another "outstanding" witness (R. 2193) concerned his refusal of an offer for the purchase of his own property (R. 708–716). Other witnesses for the landowners used offers and listings as the basis of their opinions of value in preference to known sales (R. 662, 688–689, 801–802,

1057, 1389–1390, 1579). The attorney for some of the condemnees withdrew evidence as to offers for lands outside the area taken, but he did not withdraw the evidence as to alleged offers for the very lands condemned or the opinion testimony based on offers (R. 2110). But even the partial withdrawal was ineffective, for it clearly appears that the trial judge considered the offers in arriving at his awards of just compensation (R. 2193–2195). Under these circumstances, notwithstanding the harmless-error statute (28 U. S. C. sec. 391) or Rule 61 of the Federal Rules of Civil Procedure, the trial court committed error of so substantial a nature as to require reversal. *McCandless* v. *United States,* 298 U. S. 342, 347–348; *Lynch* v. *Oregon Lumber Co.,* 108 F. 2d 283, 285–286 (C. C. A. 9); *University City, Mo.* v. *Home Fire & Marine Ins. Co.,* 114 F. 2d 288, 295 (C. C. A. 8); *Worcester* v. *Pure Torpedo Co.,* 127 F. 2d 945 (C. C. A. 7). Although the presumption is that the trial court has disregarded all improper evidence, the presumption cannot have any effect where, as here, the contrary is apparent (R. 2193–2195). Since the consideration of the improper evidence rendered the findings "clearly erroneous", Rule 52 (a) of the Federal Rules is no obstacle to a reversal. Hence, it is plain that solely on the ground of the consideration of evidence relating to offers the judgment of the district court was properly reversed.

2. The circuit court of appeals did not decide whether or not it was error for the trial judge to inspect the lands after the trial, but did hold that it was prejudicial error to receive information from the police officer concerning the topography of the land as it was before the Government went into possession (R. 2342–2343). While the Government requested the inspection by the judge, it did not invite or acquiesce in the examination of the police officer (R. 2195, 2221). The information so obtained is not included in the record and the Government was afforded no opportunity to cross-examine or offer rebuttal testimony. The trial had ended. Since it appears that the information strongly influenced the judgment of the trial court (R. 2195–2196, 2221–2222), it follows that the judgment was properly reversed on this ground also. *Carter* v. *Kubler,* 320 U. S. 243, 247; *Rhodes* v. *Federal Land Bank of St. Paul,* 140 F. 2d 612, 614 (C. C. A. 8); *Moser* v. *Mortgage Guarantee Co.,* 123 F. 2d 423, 425 (C. C. A. 9).

3. In view of the conformity provisions of the General Condemnation Act of August 1, 1888, 40 U. S. C. sec. 258 and of the Texas law, the Government was entitled to a trial *de novo* after objecting to the commissioners' awards (see Statement, *supra,* p. 3). Texas Anno. Rev. Civ. Stat., Article 3266. At such trial it is error to admit or consider the amounts previously awarded by the commissioners. *Sharp* v. *United States,* 191 U. S.

341, 357; *Lower Colorado River Authority* v. *Burton,* 170 S. W. 2d 783, 785 (Tex. Civ. App.); *Crystal City & U. R. Co.* v. *Boothe,* 126 S. W. 700 (Tex. Civ. App.); *City of Denton* v. *Chastain,* 156 S. W. 2d 554 (Tex. Civ. App.). Yet, after the trial, the trial judge interviewed the commissioners, discussed with them the land and their value, and how they had arrived at their awards for land and crops (R. 2227–2231). Although the judge was accompanied by a government attorney, the record is silent as to whether the latter objected to or acquiesced in the judge's visit to the commissioners. In view of the lack of opportunity to cross-examine the commissioners and offer rebuttal testimony and the apparent influence that the evidence received outside the record had on the trial judge (R. 2227–2231), the interviewing of the commissioners was reversible error. *Carter* v. *Kubler,* 320 U. S. 243, 247; *Rhodes* v. *Federal Land Bank of St. Paul,* 140 F. 2d 612, 614 (C. C. A. 8); *Moser* v. *Mortgage Guarantee Co.,* 123 F. 2d 423, 425 (C. C. A. 9). It clearly appears that the trial judge arrived at his awards by mathematically adjusting the commissioners' awards by a fixed percentage (R. 2230–2231). This was not the trial *de novo* to which the Government was entitled.

Petitioners urge that in any event the awards to tenants for crops should stand because they were not affected by the erroneous evidence (Pet.

25–26). However, it is evident from the opinion that the trial judge discussed with the commissioners their crop valuations and determined therefrom that their valuations were 50% too low (R. 2229–2231), so that the awards for crops were based upon information gained from the commissioners. Furthermore, the court made a finding of value for each tract, including land, improvements and growing crops thereon, and then ordered distribution of the total award between the owner and tenant wherever necessary (R. 2248–2287). This being so, the awards for crops are inextricably bound up with the overall judgments and must fall with them.[3]

4. After the circuit court of appeals had rendered its decision and denied a petition for rehearing, petitioners filed a motion in that court for the purpose of permitting the trial judge

[3] When a tract of land in which various persons have separate interests is condemned, just compensation is determined as if the property were a unit in separate ownership, without reference to conflicting claims, and then apportioned among the parties according to their respective interests. *United States* v. *Dunnington*, 146 U. S. 338, 351; *Meadows* v. *United States*, 144 F. 2d 751, 752–753 (C. C. A. 4); *United States* v. *576.734 Acres of Land, etc.*, 143 F. 2d 408, 409 (C. C. A. 3); *Carlock* v. *United States*, 53 F. 2d 926, 927 (App. D. C.). The condemnor is interested only in the total award and is not legally concerned with the distribution between the various claimants. *United States* v. *Dunnington*, 146 U. S. 338, 352–353; *United States* v. *Lands in Hempstead, Nassau, Cy, N. Y.*, 129 F. 2d 918, 919–920 (C. C. A. 2); *St. Paul* v. *Certain Lands in St. Paul*, 48 F. 2d 805, 807 (C. C. A. 8).

to amend his opinion, which he had adopted as his findings of fact and conclusions of law (R. 2247), in order to show that his awards of just compensation had not been affected by any erroneous evidence, but had been based solely on competent testimony (R. 2357–2365). Relying upon Rule 75 (h) of the Federal Rules of Civil Procedure,[4] petitioners now assert that the circuit court of appeals erred in denying the motion (Pet. 9–10, 19, 27–28). This rule permits the courts to make additions or corrections in the record on appeal so that it will truly and completely conform to the record in the trial court. Petitioners do not deny that the copy of the district court's opinion appearing in the record at pages 2147–2232 is a correct transcript of the court's oral statement. While petitioners rely upon the power to correct the record upon appeal, they, in fact, are attempting to secure a

[4] Rule 75 (h) provides: "It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court."

revision of the opinion in order to prevent a reversal for the errors appearing therein (cf. R. 2360). Plainly Rule 75 (h) does not compel or even justify such action. *Kennedy* v. *United States,* 115 F. 2d 624 (C. C. A. 9); *United States* v. *Forness,* 125 F. 2d 928, 931 (C. C. A. 2).

CONCLUSION

The decision below is correct and involves neither a conflict of decisions nor a question of general importance. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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